No. 88-389

Supreme Court, U.S.
FILED
DEC 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,

Appellant,

v.

JUNE M. BETTS,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANT

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QUESTION PRESENTED

Must age-based distinctions in benefits offered through bona fide employee benefit plans, including plans promulgated prior to the passage of the Age Discrimination in Employment Act, be justified by a substantial business purpose or age-related cost considerations?

PARTIES

The parties to the proceedings below were the Public Employees Retirement System of Ohio, the Hamilton County Board of Mental Retardation and Developmental Disabilities, and June M. Betts.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, issued June 3, 1988, is set forth in the appendix to the Jurisdictional Statement (A-1)[1] and is reported at 848 F.2d 692. The decision of the United States District Court for the Southern District of Ohio, Western

[1] References to "(A-)" are to the appropriate pages in the appendix to the Jurisdictional Statement. References to "(JA-)" are to the appropriate pages in the Joint Appendix. References to "(a-)" are to the appropriate pages in the appendix to the Brief for Appellant.

Division, is also set forth in the appendix to the Jurisdictional Statement (A-20) and is reported at 631 F. Supp. 1198.

JURISDICTION OF THE COURT

This is an appeal from a judgment of the United States Court of Appeals for the Sixth Circuit entered on June 3, 1988, holding Ohio Revised Code § 145.35 in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. This action was initiated by Appellee in the district court by filing a complaint pursuant to 42 U.S.C. § 1983 and 29 U.S.C. § 626(c). The Notice of Appeal was filed with the Sixth Circuit on August 4, 1988, and the appeal docketed with this Court on August 31, 1988, both events occurring within 90 days of entry of the court of appeals' judgment. Probable jurisdiction was noted on October 17, 1988. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(2).[2]

STATUTES AND REGULATIONS INVOLVED

This case involves 29 U.S.C. § 623(a) and (f)(2) (a-5), Ohio Revised Code § 145.35 (a-21), and 29 C.F.R. § 860.120(a)(1) and (f)(1)(iii) (a-32), which have been reproduced in the appendix to the Jurisdictional Statement. (A-38-41.)

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[2] This appeal, predicated on a decision issued June 3, 1988, is unaffected by a recent amendment to 28 U.S.C. § 1254, eliminating the right to appeal certain decisions of the courts of appeals. *See* Act of June 27, 1988, Pub. L. No. 100-352, § 7, 102 Stat. 662, 664 (1988).

STATEMENT OF THE CASE

A. The Age Discrimination In Employment Act.

The Age Discrimination in Employment Act ("ADEA" or "the Act"), 29 U.S.C. §§ 621-634, prohibits discrimination against workers age forty and older[3] "with respect to . . . compensation, terms, conditions, or privileges of employment . . . because of age. . . ." 29 U.S.C. § 623(a)(1). (a-5.) One of the exceptions to this general proscription is contained in 29 U.S.C. § 623(f)(2) ("section 4(f)(2)") (a-5), which provides that

> [i]t shall not be unlawful for an employer, employment agency, or labor organization –
>
> * * *
>
> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter,[4] except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary

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[3] At the time of its passage, the ADEA protected workers between the ages of forty and sixty-five. In 1978, the upper age limit was raised to seventy. In 1986, the upper limit was eliminated entirely.

[4] The purposes of the ADEA are

> to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b).

retirement of any individual. . . . because of the age of such individual. . . .[5] (Footnotes added.)

B. The Public Employees Retirement System of Ohio.

In 1933, the Ohio General Assembly created the Public Employees Retirement System of Ohio ("PERS").[6] Under the PERS statutory scheme, *see* Ohio Rev. Code ("O.R.C.") §§ 145.01-.59, monthly retirement benefits are available to members who terminate their public employment and qualify either on the basis of age and service, *see* O.R.C. § 145.33 (a-13), or because of permanent disability, *see* O.R.C. § 145.35 (a-21). A member of PERS is eligible for age and service retirement benefits if (1) he has accumulated a minimum of five years of service credit and is at least sixty years of age, O.R.C. § 145.33 (a-13), or (2) has thirty years of service credit, *id.*, or (3) has twenty-five years of service credit and is at least fifty-five years of age, O.R.C. § 145.34. (a-19.) Any member who has a minimum of five years of service credit, has not attained the age of sixty, is not receiving retirement benefits under any other Ohio or municipal retirement program, and is incapacitated by a disabling medical condition which is, or is presumed to be, permanent, may qualify for disability retirement benefits. O.R.C. § 145.35.

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[5] The language prohibiting involuntary retirement provisions was added in 1978.

[6] PERS is one of five public employee retirement systems in existence in Ohio. The State Teachers Retirement System, School Employees Retirement System, Police and Firemen's Disability and Pension Fund, and Highway Patrol Retirement System are the other four. The State Teachers and School Employees systems have disability retirement provisions identical to the PERS provision. *See* O.R.C. §§ 3307.42 and 3309.39.

(a-21.) The calculation for arriving at the annual benefit for an age and service retirant and disability retirant is similar, except that since 1976, a disability retirant receives no less than thirty percent of his final average salary. O.R.C. § 145.36. (a-23.)

A disability retirant is treated as if on leave of absence for the first five years of retirement. If his condition improves sufficiently during that period of time, he is entitled to be restored to his former or similar position and salary. O.R.C. § 145.39. (a-27.) An age and service retirant, while not on leave of absence, may, after eighteen months, apply for full-time employment with any public employer covered by PERS, including his former agency. O.R.C. § 145.381(C). (a-25.) If he is reemployed, his pension benefits are suspended until he again chooses to retire. *Id.*

Funding for PERS is provided by contributions from employees, *see* O.R.C. § 145.47, and employers, *see* O.R.C. § 145.48. These contributions are not segregated into separate funds for age and service or disability retirement benefits. Rather, they serve as resources for the payment of all benefits offered by PERS. *See* § 145.23. (a-9.) All disbursements of benefits, age and service as well as disability, are from one fund. *See* O.R.C. § 145.23(C). (a-10.) In addition, actuarial assumptions underlying the fiscal soundness of PERS are predicated on the amount of liability created by the payment of both age and service and disability retirement benefits.

At the time this litigation was initiated, PERS ranked fifteenth among all public and private pension systems in the United States, with assets in excess of one billion dollars. *See Pensions and Investment Age*, Special Profiles Issue: 22 (Jan. 20, 1986). During calendar year 1984, PERS

disbursed a total of $336,443,286.01 in age and service retirement benefits and $39,772,278.07 in disability retirement benefits.

C. June M. Betts.

June Betts ("Betts") was born on September 30, 1923. She was hired by the Hamilton County Board of Mental Retardation and Developmental Disabilities ("HCB") in 1978. From approximately 1979 until 1984, she was employed by HCB as a speech pathologist. In 1984, because of acknowledged unsatisfactory job performance, Betts voluntarily accepted reassignment as a workshop specialist, a lesser position.

In September of that year, because of failing health, Betts became incapable of satisfactorily performing the duties of a workshop specialist. Once again, she voluntarily accepted reassignment to a less responsible position. She also accepted a reduction in salary.

By May 1985, Betts' job performance had deteriorated to such an extent that it was recognized by employer and employee alike that she had become incapable of serving her clients or the agency. At all times, she was both informed by HCB and personally aware of her diminishing capacities.

Later in May, HCB notified Betts that it had no choice but to initiate proceedings to place her on unpaid medical leave. Betts was also made aware that she met minimum eligibility standards for age and service retirement benefits with PERS. Such benefits would provide her with a monthly pension and health coverage. At all times, Betts was free to contest any efforts by HCB to have her placed on unpaid medical leave and to refuse to retire.

On June 3, 1985, Betts voluntarily submitted to HCB a letter announcing her retirement. At no time was Betts' age mentioned as a factor contributing to HCB's employment decisions.

In July 1985, Betts submitted to PERS applications for both age and service retirement benefits and disability retirement benefits, requesting that the former be processed only if PERS rejected Betts' application for disability retirement benefits. Subsequently, Betts was notified by PERS that her application for disability retirement benefits could not be considered in light of the age limitation in O.R.C. § 145.35. Her application for age and service retirement benefits was then processed and approved.

D. The Proceedings Below.

On June 14, 1985, Betts filed a complaint with the United States District Court for the Southern District of Ohio, Western Division, and a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging that PERS' refusal to process her application for disability retirement benefits violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. Betts filed an amended complaint on October 9, 1985.[7] (JA-1.)

The sole issue presented to the district court was whether PERS qualified for exemption from the prohibitions of the ADEA pursuant to section 4(f)(2). The district court acknowledged that PERS disability retirement benefits were "bona fide" to the extent that they "exist[] and

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[7] Betts later dropped a § 1983 claim.

pay[] substantial benefits," *Betts v. Hamilton County Board of Mental Retardation and Developmental Disabilities*, 631 F. Supp. 1198, 1204 (S.D. Ohio 1986) (A-29-30), and that they are designed to provide benefits "to those younger individuals who become permanently disabled and who would otherwise have no source of income during their disability," *id.* at 1202. (A-25.)

The district court, however, chose not to address PERS' contention that it was not a "subterfuge to evade the purposes of the [ADEA]" by virtue of the Court's decision in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), which held, among other things, that a bona fide employee benefit plan that predated the passage of the ADEA could not be a subterfuge to evade the purposes of the Act and that employers did not have to show a business purpose in order to justify age-based distinctions in employee benefit plans. *See McMann*, 434 U.S. at 203.[8] Instead, the district court scrutinized the salient characteristics of PERS disability retirement benefits and determined that the age sixty limitation on applying for those benefits was not dictated by "significant [age-related] cost considerations." *Betts*, 631 F. Supp. at 1204. (A-29.) As a result, PERS disability retirement benefits did not qualify as "the type of plan contemplated by the exemption." *Id.* The court drew support for this proposition from EEOC guidelines claiming that the "legislative history of . . . [section 4(f)(2)] indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations." *Betts*, 631 F. Supp. at 1204. (A-28-29.) (*quoting* 29 C.F.R. § 860.120(a)(1), *presently codified at* 29 C.F.R. § 1625.10(a)(1)). (A-40.) (a-32.)

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[8] The other crucial ruling in *McMann* was that section 4(f)(2) did not prohibit involuntary retirement provisions.

The district court then provided two other reasons why PERS did not qualify for coverage under section 4(f)(2). First, the court reasoned that Betts' ineligibility for disability retirement benefits reduced her choices for responding to the problems generated by her poor health from three – unpaid medical leave, disability retirement benefits, and age and service retirement benefits – to only two. The court believed that Betts' only legitimate option, however, was to apply for age and service retirement benefits. *Id.* at 1204-05. (A-30.) According to the court, therefore, Betts' ineligibility for disability retirement benefits resulted in her being involuntarily retired and constructively discharged.

Second, the district court held that, by its terms, PERS' plan did not authorize involuntary retirement. Consequently, PERS could not qualify for the protections of section 4(f)(2) because it had not observed the terms of its plan. *Id.* at 1205. (A-31-32.)

On appeal, the Sixth Circuit affirmed. *See Betts*, 848 F.2d 692 (6th Cir. 1988). (A-1.) Relying exclusively on the legislative history of the 1978 amendment to section 4(f)(2), the appellate court concluded that

> Congress expressly repudiated the Supreme Court's decision and reasoning in *United Airlines v. McMann*, 434 U.S. 192 (1977), which held that a bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose. H. R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 529.

Betts, 848 F.2d at 694. (A-4.)

The Sixth Circuit also agreed with the district court that the "critical factor" in determining whether PERS

was exempt under section 4(f)(2) was whether the age sixty cut-off for applying for disability retirement benefits was "based upon age-related cost factors as set forth" in 29 C.F.R. § 860.120(a)(1) and (f)(1)(iii). The court stated:

> Where . . . the employer uses age – not cost, or years of service, or salary – as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of [section 4(f)(2)]. *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 319 (7th Cir. 1988). *Accord, Equal Employment Opportunity Commission v. City of Mt. Lebanon . . .*, No. 87-3189 (3d Cir. March 30, 1988). . . .

Betts, 848 F.2d at 694-95.[9] (A-5-6.) Because PERS did not present evidence that the age sixty limitation was based

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[9] Sandwiched between the Sixth Circuit's pronouncement concerning the current status of the holding in *McMann* and its quote from *Karlen* is the following cryptic comment: "*We agree [with the district court]*. Under the Act, an age-based benefit plan which denies disability retirement to older employees in favor of forcing length of service retirement is unlawful unless it can be justified by a substantial business purpose." *Betts*, 848 F.2d at 694. (A-5.) (Emphasis added.) Although the court referred to the concept of "forced retirement," it is apparent, when the court's decision is read in its entirety, that the holding of the case was not that Betts had been "involuntarily retired" within the meaning of section 4(f)(2).

The Sixth Circuit was agreeing with the conclusion of the district court that " 'the critical factor in [the] determination of whether defendants' plan is the *type of plan* exempted is whether *it is based upon age-related cost factors as set forth in the regulatory interpretation of . . . [section 4(f)(2)].*' 631 F. Supp. 1198, 1204 (S.D. Ohio 1986). *See* 29 C.F.R. 860.120(a)(1); 29 C.F.R. 860.120(f)(1)(iii)." *Betts*, 848 F.2d at 694. (A-4.) (Emphasis

(Continued on following page)

on age-related cost considerations, the Sixth Circuit felt obligated to uphold the district court's grant of summary judgment for Betts. *Id.* at 695. (A-6-7.)

The Sixth Circuit's decision was not unanimous. *See Betts*, 848 F.2d at 695. (Wellford, J., dissenting.) (A-7.) Judge Wellford agreed with the district court's conclusion that PERS was bona fide, *id.* at 699 (JA-18), and noted the district court's finding that the plan did not reflect any "ill will" toward Betts or other similarly situated individuals, *id.* at 697 (JA-10). He did not, however, share the district court's other conclusions.

Judge Wellford found that PERS' plan "sought to encourage long term employment . . . and . . . was not designed to discriminate against the hiring of the older worker, as evidenced by [HCB's] hiring of Betts at age 55." *Id.* at 700. (JA-17.) He emphasized that there was no dispute between the parties that steps taken to separate Betts from employment were motivated exclusively by her poor health and its effect on her job performance. *Id.* at 699. (JA-15.) These factors, coupled with the facts that PERS' plan "did not require or make reference to age-based involuntary retirement," *id.* at 700 (A-18), that Ohio

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(Continued from previous page)

added.) (Footnote omitted.) Neither the district court's opinion nor the above-quoted regulations, which serve as the bases for the Sixth Circuit's conclusion, even remotely suggest that a substantial business purpose or age-related cost considerations can justify involuntary retirement. Thus, it is improbable that the Sixth Circuit was addressing the issue of involuntary retirement when it made the existence of a substantial business purpose and age-related cost considerations the twin foundations for its affirmance of the district court's decision.

law permitted an age and service retirant to suspend his retirement and secure employment with any public employer, including his former employer, *id.* at 701 (A-18), that PERS had acted in observance of its plan, and that PERS' plan "was adopted long before ADEA became law," *id.* at 700 (A-16), convinced the dissent that PERS should be exempt from the ADEA.

Judge Wellford devoted a major portion of his dissent to the "age-related cost considerations" theory relied on by the Sixth Circuit majority and the district court to invalidate PERS' plan. He observed that the language of section 4(f)(2) made no mention of age-related cost considerations and that the EEOC's regulations were not "in accord with statutory purpose and add[ ] a dimension, economic cost justification, *not* in the statute." *Betts*, 848 at 701. (A-18-19.) (Emphasis in original.) The dissent criticized the majority's reliance on the legislative history of the 1978 amendment of section 4(f)(2) to undermine the clear language of the exemption, especially in light of the fact that the legislative history in question demonstrated that the purpose of the 1978 amendment was not to overrule *McMann* in respect to the definition of subterfuge and the treatment of pre-existing plans, but only in respect to the issue of involuntary retirement.

SUMMARY OF ARGUMENT

Section 4(f)(2) of the Age Discrimination in Employment Act does not require a bona fide employee benefit plan to demonstrate that a business or economic purpose underlies distinctions in benefits offered to older and younger workers. In *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), the Court reviewed the plain terms of section 4(f)(2) and held that (1) employers with bona fide

employee benefit plans did not have "to show an economic or business purpose in order to satisfy the subterfuge language of . . . [section 4(f)(2)]"; (2) because a subterfuge is a "scheme, stratagem, or artifice of evasion," a bona fide plan created years before the passage of the ADEA could not be a subterfuge to evade the Act's purposes; and (3) involuntary retirement provisions did not violate the ADEA. *McMann*, 434 U.S. at 203.

In 1978, Congress amended section 4(f)(2) to make involuntary retirement provisions unlawful. The unambiguous language of the amendment, however, gives no indication that Congress intended to overrule any other portion of the *McMann* decision. Thus, the Sixth Circuit's opinion that *McMann* also was overruled in respect to how a pre-existing plan can satisfy the subterfuge prong of section 4(f)(2) is based exclusively on a tenuous reading of legislative history associated with the 1978 involuntary retirement amendment.

Assuming, arguendo, that the 1978 legislative history evidences some congressional displeasure with *McMann* for its holding in respect to the meaning of subterfuge, that displeasure alone, in the absence of legislation, cannot serve as the basis for overruling *McMann* concerning the subterfuge issue. The 1978 amendment undeniably dealt only with involuntary retirement. *EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988). *Accord, EEOC v. Cargill, Inc.*, 855 F.2d 682, 686 (10th Cir. 1988). When Congress amended section 4(f)(2) in 1978 to prohibit involuntary retirement provisions, it also could have added language that redefined subterfuge or incorporated a business purpose requirement within section 4(f)(2). *Id.* The fact that Congress did not is more reflective of the legislature's intention in 1978 and the purpose

of the 1978 amendment than is legislative history which, at best, is ambiguous.

Even if the legislative history relied on by the Sixth Circuit was given its most expansive interpretation *and* given the force of law, it would overrule *McMann* only to the extent that a plan could no longer satisfy the subterfuge language of section 4(f)(2) by virtue of predating the passage of the Act. The legislative history still would not justify reading a business purpose into the exemption.

The weaknesses inherent in the Sixth Circuit's holding concerning the current vitality of *McMann* and the "business purpose" rule also undermine the appellate court's conclusion that only plans that base differences in benefits for older workers on age-related cost considerations qualify for the coverage of section 4(f)(2). The plain language of section 4(f)(2), both before and after amendment in 1978, makes no reference to age-related cost considerations. By utilizing the phrase "any bona fide employee benefit plan," Congress intended to protect a wide range of benefits in order to enlist the full cooperation of employers in advancing the purposes of the ADEA: the hiring, retaining, and promotion of workers regardless of age. Although the legislative history of the 1978 amendment contains the comments of some legislators professing support for the "age-related cost considerations" theory, that same history emphasizes that in 1978, Congress was concerned with the problem of involuntary retirement and that the 1978 amendment, as drafted, did not extend beyond addressing that problem. Moreover, sporadic references in 1978 to age-related cost considerations are not part of the legislative history of

section 4(f)(2) as promulgated in 1967 and cannot, therefore, be relied on to explain the meaning of a statute enacted a decade earlier. *McMann*, 434 U.S. at 200 n. 7.

No matter how one interprets the 1978 legislative history, the facts remain that in 1967 Congress did not limit the exemption to plans reflecting age-related cost considerations and in 1978 Congress did not pass legislation to make the age-related cost considerations theory controlling law. *See County of Orange*, 837 F.2d at 422; *see also Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 278-79 (1977). The impressions of a few legislators in 1978 concerning the intentions of a Congress convened ten years earlier should not be deemed sufficient authority to supercede clear and unambiguous statutory language. *See Consumer Product Safety Commission v. GTE Sylyania*, 447 U.S. 102, 117-18 (1980).

Finally, even if an age-related cost considerations theory is adopted as law, the coverage of section 4(f)(2) still should be extended to PERS disability retirement benefits because they are an integral part of an otherwise bona fide retirement and pension system. *See Alford v. City of Lubbock*, 664 F.2d 1263, 1272 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982). Because PERS disability retirement benefits are designed to provide a continuous, life-long source of income, they are clearly distinguishable from the type of "one-shot" or ad hoc payments invalidated by other courts. As important, because PERS disability retirement benefits do not serve to discourage the hiring, retaining, or promotion of older workers, they do not run afoul of the purposes of the ADEA.

ARGUMENT

I. THE COURT'S HOLDING IN *UNITED AIRLINES, INC. V. MCMANN*, CONCERNING THE DEFINITION OF SUBTERFUGE, A BUSINESS PURPOSE RULE, AND THE MANNER IN WHICH A BONA FIDE EMPLOYEE BENEFIT PLAN THAT PREDATES THE PASSAGE OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT MAY SATISFY THE SUBTERFUGE LANGUAGE OF SECTION 4(F)(2) OF THE ACT, REMAINS CONTROLLING LAW.

Justice Frankfurter once remarked that the three rules of statutory construction are: "(1) Read the statute; (2) read the statute; (3) read the statute!" *Quoted in* H. Friendly, *Benchmarks* 202 (1967). *See also Lewis v. United States*, 445 U.S. 55, 60 (1980) (statutory interpretation begins with "language of the statute itself"). This directive compliments the "fundamental canon of statutory construction . . . that . . . unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).

Consistent with these tenets, the Court, in *McMann v. United Airlines, Inc.*, 434 U.S. 192 (1977), reviewed the language of section 4(f)(2) and reached the following conclusions relevant to the case at bar: (1) "[i]n ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion." *Id.* at 203. Because this definition necessarily implies "intent," a bona fide employee benefit plan established several years prior to the passage of the ADEA "cannot be a subterfuge to evade [the] Act . . . ," and (2) section 4(f)(2) does not require "an employer to show an

economic or business purpose in order to satisfy the subterfuge language of the Act." *Id.*

In addition to defining "subterfuge" and rejecting the "business purpose" theory, the *McMann* Court also resolved a conflict between the circuits involving involuntary retirement by ruling that section 4(f)(2) protected mandatory retirement provisions. At the time, section 4(f)(2) provided that it was lawful for an employer

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual[.]

One year later, in 1978, Congress responded to *McMann* by amending section 4(f)(2) by adding the following phrase:

> and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual. . . .

Obviously, there is nothing in the plain language of the exemption as originally drafted or the amendment thereof to indicate that Congress intended to incorporate within section 4(f)(2) the requirement that age-based distinctions in benefit plans had to be justified by a substantial business purpose or that a pre-existing plan could be a subterfuge to evade the ADEA. Consequently, the Sixth Circuit was reduced to relying on legislative history to support its opinion that "Congress expressly repudiated" the holding of *McMann* in respect to pre-existing plans and the business purpose theory.

The specific piece of legislative history relied on by the Sixth Circuit is the following comment by the Conference Committee on the 1978 amendment:

> The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.
>
> In *McMann v. United Airlines*, 98 S. Ct. 244 (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F.2d 217 (1976). The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.

H. R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 529. *Also reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967* ("*EEOC Legislative History*"), at 519 (1981). Only the last sentence, when read without reference to the material that precedes it, lends any credence to the Sixth Circuit's holding. Yet even that last sentence does not indicate that Congress was criticizing the *McMann* court's pronouncements in regard to the definition of subterfuge, the manner in which a pre-existing plan may satisfy the subterfuge prong of section 4(f)(2), or the business purpose theory. Rather, when read in context, the last sentence indicates only that Congress intended to make involuntary retirement provisions unlawful, whether or not they were created before or after the passage of the ADEA in 1967.

According to the summary of the Conference Report on the Age Discrimination in Employment Act Amendments of 1978, H.R. 5383,

> the bill amends and strengthens the Age Discrimination in Employment Act of 1967 (ADEA) by increasing the maximum age for protection under the Act from 65 to 70 for most private employees, and by removing completely the mandatory retirement age of 70 for most federal employees. *The bill also clarifies Section 4(f)(2) (bona fide retirement plans) under the ADEA so that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.*

124 Cong. Rec. 7884 (March 21, 1978). (Emphasis added). This interpretation of the 1978 amendment is reinforced by the remarks of Congressman Waxman, a sponsor of the 1978 amendment:

> A study of the legislative history surrounding the 4(f)(2) exception reflects the intention that it further and encourage the employment of older workers. Congress feared that requiring participation of older workers in benefit plans would discourage employment of newly hired older workers.
>
> The conference report clarifies any doubt surrounding the intent of the exception and specifically disagrees with the finding of the Supreme Court in *McMann v. United States* [sic] (98 S. Ct. 244 1977). The amendment prohibits mandatory retirement for persons under age 70 enrolled in a bona fide retirement or pension plan. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act. One exception to this prohibition would be persons between 65 and 70 subject to a collective bargaining agreement in effect prior to September 1, 1977.

124 Cong. Rec. 7888 (March 21, 1978).

H.R. 5383 evolved into Public Law 95-256. Section 2(a) of the public law contained the proscription against involuntary retirement that modified section 4(f)(2) of the Act. Section 2(b) of Public Law 95-256 provided that

(b) The amendment made by subsection (a) of this section shall take effect on the date of enactment of this Act, except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938), and which would otherwise be prohibited by the amendment made by section 3(a) of this Act, the amendment made by subsection (a) of this section shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first.

Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(b), 92 Stat. 189 (1978). (a-9.) The language of Public Law 95-256 clarifies the scope of the comments made by Representative Waxman and the conferees: Congress intended to prohibit involuntary retirement provisions; pursuant to section 2(b) of Public Law 95-256, all involuntary retirement provisions, even those that existed prior to 1967, were excluded from the protection of the exemption; except that employers with mandatory retirement provisions included in collective bargaining agreements entered into prior to September 1, 1977, were given until as late as 1980 to bring those collective bargaining agreements into compliance with the new law. Thus, rather than rejecting *McMann* in its entirety, the criticism of the holding in that case lodged by the conferees and Representative Waxman was intended to emphasize that under the amendment to section 4(f)(2), involuntary retirement provisions no longer would be valid, even if they predated the passage of the ADEA in 1967.[10] *See* Remarks of Representative

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[10] A few members of the House, including Representatives Hawkins and Pepper, offered their opinions that an economic or business purpose should be required before a bona fide

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Weiss, co-author of the 1978 amendment to section 4(f)(2), 124 Cong. Rec. 7887 (March 21, 1978) ("provision in pension or seniority plan which would mandate early retirement would be unlawful regardless of whether the plan came into effect before or after the enactment of the ADEA or these amendments").

In any event, the preceding legislative history, as well as other comments by members of Congress during the debates over the 1978 amendment to section 4(f)(2) is, at best, ambiguous and does not amount to "express repudiation" of *McMann*. As noted by the United States Court of Appeals for the Ninth Circuit,

> the 1978 amendment to section 4(f)(2) only dealt with involuntary retirement provisions. Congress could have *easily* invalidated *McMann* entirely by altering the definition of subterfuge or by adding a requirement that discriminatory plans be justified by cost considerations. We presume that Congress adopted *McMann's* definition of subterfuge when it reenacted 4(f)(2) without amending the subterfuge language. *Accord Lorillard v. Pons*, 434 U.S. 575, 581. . . .

EEOC v. County of Orange, 837 F.2d 420, 422 (9th Cir. 1988). (Emphasis added.) *Accord, EEOC v. Cargill*, 855 F.2d

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employee benefit plan qualified for the exemption under section 4(f)(2). *See, e.g.*, 124 Cong. Rec. 7881 (March 21, 1978), *reprinted in EEOC Legislative History*, at 528; 124 Cong. Rec. 7886 (March 21, 1978), *reprinted in EEOC Legislative History*, at 533. These comments, however, constitute the personal views of these congressmen concerning the scope of section 4(f)(2) as originally enacted in 1967. They do not address the purpose of the 1978 amendment, which clearly only spoke to the problem of involuntary retirement. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) ("views of subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). (Citations and footnote omitted.)

682, 686 (10th Cir. 1988) (quoting the preceding passage in *County of Orange*); *EEOC v. Maine*, 644 F. Supp. 223, 226 (D. Me. 1986), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987) ("If Congress had wished to state a plan's chronology alone would not satisfy the subterfuge prong of Section 4(f)(2), it could have plainly said so."); *International Brd. of Elec. Workers, Local 1439 v. Union Elec. Co.*, 585 F. Supp. 261, 264 (E.D. Mo. 1984), *aff'd*, 761 F.2d 1257 (8th Cir. 1985).

The preceding cases all stand for the proposition that subsequent legislation, not legislative history, is necessary to supercede one of this Court's standing interpretations of law. *Cf. Consumer Product Safety Commission*, 447 U.S. at 118 n. 13 ("[s]ubsequent legislation declaring . . . intent of earlier statute . . . entitled to great weight" . . . but "[s]tatement in conference report of such legislation as to what . . . committee believes an earlier statute meant is obviously less weighty"). Congress could only defuse the impact of *McMann* by transforming any displeasure with that decision into legislation plainly contrary to the Court's position. *See Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 278-79 (1977) (by re-enacting legislation in substantially same form, Congress ratifies court's statutory interpretation, even if that interpretation is the subject of criticism). Although Congress did specifically overrule *McMann* in respect to involuntary retirement provisions, it did not do so with respect to the other holdings in *McMann*.

Even if it is assumed that the thrust of the 1978 amendment to section 4(f)(2) is broader than reflected by the amendment's plain language and that the legislative history previously referred to provides that additional

breadth, the most expansive reading possible of the portion of the conferees' remarks that serves as the underpinning of the Sixth Circuit's opinion – we "disagree with the Supreme Court's holding . . . [in *McMann*]. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments" – would serve only to limit the manner in which a pre-existing plan can demonstrate that it is not a subterfuge. The conferees' remarks still could not be interpreted to mean that the *McMann* Court's definition of subterfuge and its position on the business purpose theory are invalid.[11]

II. SECTION 4(F)(2) OF THE ADEA DOES NOT REQUIRE AN EMPLOYER TO DEMONSTRATE THE EXISTENCE OF AGE-RELATED COST CONSIDERATIONS IN ORDER TO JUSTIFY AGE-BASED DISTINCTIONS IN BENEFITS OFFERED THROUGH A BONA FIDE EMPLOYEE BENEFIT PLAN.

Of course, the Sixth Circuit went much further than simply stating that a business purpose must exist before

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[11] If the conferees were expressing the opinion that employee benefit plans could not satisfy the subterfuge requirement of section 4(f)(2) simply by the fact that they predated the Act, then it would appear that they agreed with the concurrence of Justice White and the dissent of Justices Marshall and Brennan in *McMann*. But Justice White also rejected the business purpose theory, opining that the Act exempted "all retirement plans . . . as long as the benefits they pay are not so unreasonably small as to make the 'retirements' nothing short of discharge." *McMann*, 434 U.S. at 207. Justices Marshall and Brennan expressed no opinion on how an employee benefit plan, pre-existing or otherwise, could satisfy the subterfuge prong of the exemption. *Id.* at 219 n. 13.

an employee benefit plan, whether or not it predates the passage of the ADEA in 1967, may make distinctions between older and younger workers. The court of appeals would deny the protections of section 4(f)(2) to all bona fide employee benefit plans except those that base differences in benefits on age-related cost considerations.[12] But the language of section 4(f)(2), as well as relevant legislative history, both before and concurrent with the 1978 amendment, cannot justify the Sixth Circuit's distorted reading of an unambiguous statute.

A. The Language of Section 4(f)(2) Does Not Make Any Mention Of Age-Related Cost Considerations.

Section 4(f)(2) states that it shall not be unlawful for an employer

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual[.]

29 U.S.C. § 623(f)(2).

When inquiring into the meaning of legislation, "[a]bsent a *clearly* expressed legislative intention to the contrary, . . . [statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission*, 447 U.S. at 108. (Emphasis added.) The starting point for interpreting statutory language is dictionary and ordinary usage. *See Pierce v. Underwood*, ___ U.S. ___, 108 S. Ct. 2541, 2549 (1988); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977). The dictionary and ordinary English usage define the term "any" to mean "[o]ne or another without restriction or exception . . . : All." *Websters II Riverside University Dictionary* 115 (1984). They define the phrase "bona fide" to mean "[a]uthentic, genuine, [that which is] performed or made in good faith."[13] *Id.* at 188. Although the dictionary does not refer to the phrase "employee benefit," one authoritative source has defined it as "virtually any form of compensation provided: (1) in a form other than direct wages; and (2) paid for in whole or in part by the employer." *See Fundamentals of Employee Benefit Programs* 2 (Employee Benefit Research Institute,

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[12] Some courts and the EEOC have taken the position that age-related cost considerations provide the only vehicle through which an employer may demonstrate that a bona fide employee benefit plan is not a "subterfuge" to evade the purposes of the Act. *See, e.g., Karlen v. City Colleges*, 837 F.2d 314 (7th Cir.), *cert. denied sub nom, Cook County College Teachers Union Local 1600 v. City Colleges of Chicago*, ___ U.S. ___, 108 S. Ct. 2038 (1988) (dicta); Brief for Appellant Equal Employment Opportunity Commission at 13 n. 8, 16-21, *EEOC v. Maine*, 823 F.2d 542 (1st Cir. 1987), *aff'g*, 644 F. Supp. 223 (D. Me. 1986). Other courts, such as the Sixth Circuit, perhaps to avoid the difficult task of reconciling the "age-related cost considerations" theory with *McMann's* definition of the term "subterfuge," inquire into the existence of age-related cost considerations for purposes of establishing whether the employee benefit plan at issue is the "type of plan" included within the section 4(f)(2) exemption. *See, e.g., EEOC v. Mt. Lebanon, Pennsylvania*, 842 F.2d 1480 (3d Cir. 1988); *see also EEOC v. Westinghouse Electric Co.*, 725 F.2d 211 (3d Cir. 1984), *cert. denied*, 469 U.S. 820 (1984). Either approach, however, is statutorily indefensible.

[13] Courts are in general agreement that a plan is bona fide when "it exists and pays substantial benefits." *See, e.g., Carpenter v. Continental Trailways*, 635 F.2d 578, 580 (6th Cir. 1980).

3d ed. 1987); *see also Websters II*, at 508. *Websters II* defines the term "plan" to refer to any "detailed scheme, program, or method worked out beforehand for the accomplishment of an object." *Id.* at 898. And it defines the term "subterfuge" to refer to a "deceptive stratagem or device . . . so as to conceal, evade, or escape." *Id.* at 1156. Thus, based on the dictionary and ordinary usage of the phrase "any bona fide employee benefit plan" which is not a "subterfuge to evade the purposes of the" ADEA, any plan designed to provide employees with benefits unrelated to salary or wages is exempt from the prohibitions of the Act, provided the plan was not conceived to avoid the statute's specified purposes of facilitating the employment of older workers.

The same conclusion emerges when industrial relations practice is examined, *cf. California Brewers Ass'n. v. Bryant*, 444 U.S. 598, 604 (1980) (industrial relations practice examined to help interpret term "seniority system" in Title VII), where the term "employee benefit plan" refers, among other things, to profit-sharing plans, disability retirement plans, severance plans, savings plans, pension plans and insurance plans. *See, e.g., The Total Approach to Employee Benefits*, 83-124, 506 (A. Deric ed. 1967).[14]

Legislation in existence at the time the critical statutory language was enacted in 1967 further demonstrates that section 4(f)(2) was and is intended to have this broad scope. *See, e.g.*, section 3 of the Welfare and Pension Plans

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[14] Even the EEOC's own regulations identify "[a]n 'employee benefit plan' . . . [as] a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as 'fringe benefits.' " *See* 29 C.F.R. § 1625.10(b).

Disclosure Act of 1958 ("WPPDA"), 29 U.S.C § 302 (repealed 1974) (a-3) (defining the phrase "employee benefit plan" to include any "employee pension benefit plan" and "employee welfare benefit plan," including those intended to provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment"); section 7 of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 207 (e)(4) (a-2) (excluding employee benefits such as "contributions . . . for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees" from the calculation of "regular rate" of wages); *see also* section 2 (a) and (b) of the Service Contract Labor Standards Act of 1965, 41 U.S.C. § 351(a)(1) and (2) (a-6) (which makes similar distinctions between benefits provided by employee benefit plans and wages). The FLSA's provisions are especially significant in view of the fact that Congress modeled portions of the ADEA after the FLSA. *See Lorillard v. Pons*, 434 U.S. 575, 583-85 (1978). Thus, the use of the phrase "any bona fide employee benefit plan" in the ADEA indicates that Congress designed section 4(f)(2) to protect a myriad of employee benefit plans. *See id.* at 585; *see also Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) ("words which had at the time a well-known meaning . . . are presumed to have been used in that sense unless the context compels to the contrary").

That Congress modified the phrase "any bona fide employee benefit plan" with the phrases "such as any retirement, pension, or insurance plan" and "which is not a subterfuge to evade the purposes of [the Act]" does not undermine the conclusion that it intended the section 4(f)(2) exemption to be a broad one. The phrase "such as"

is "not a phrase of strict limitation, but is a phrase of general similitude indicating that there are includable other matters of the same kind which are not specifically enumerated by the standard." *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981).[15] It merely provides examples of the plans protected by the exemption; it does not purport to define or qualify it. *Accord, Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974).

Even if the phrase "retirement, pension, or insurance plan" limited the coverage of section 4(f)(2) to those three types of benefit plans, nothing on the face of the statute suggests that Congress intended further modification by requiring that those plans be predicated on age-related cost considerations. *American Bank and Trust Co. v. Dallas County*, 463 U.S. 855, 864 (1983) (implied exceptions to a statute that is broad on its face viewed with disfavor). *Accord, Lewis v. United States*, 445 U.S. 55, 60 (1980). *See also Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, ___ U.S. ___, 108 S. Ct. 376, 381 (1987) (that a statute might be susceptible to more than one meaning "is not to conclude that all interpretations are equally plausible"). For example, retirement plans such as defined contributions pension plans and profit-sharing plans do not have age-related cost considerations.

Thus, according to *Black's Law Dictionary* 1021 (Fifth Ed. 1979), a pension plan is a "plan established and

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[15] *See also Cronin v. Police Dep't*, 675 F. Supp. 847, 850 n. 3 (S.D.N.Y. 1987) (same); *Barber v. Gulf Publishing Co.*, 103 Lab. Cas. (CCH) 11,676 at 24,862 n. 5 (S.D. Miss. 1986) (same).

maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees . . . (usually for life) after retirement." ERISA supplies a similar definition for the phrase "employee pension benefit plan": [a plan that] "provides retirement income to employees. . . ." 29 U.S.C. § 1002(2)(A)(i). (a-6.)

The term "subterfuge" does qualify the exemption. However, it does so only by denying the exemption's protection to a plan that has been conceived with the specific intent of evading the ADEA's purpose – encouraging the hiring of older workers. *See McMann*, 434 U.S. at 203. *See also* 29 U.S.C. § 621(b).

With these straightforward definitions in mind, it is difficult to imagine how PERS disability retirement benefits can be considered anything other than a "bona fide employee benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes" of the Act. First, even the district court acknowledged that PERS disability retirement benefits are bona fide – they exist and pay substantial benefits. Second, PERS disability retirement benefits are clearly designed as a retirement or pension plan – they serve as a life-long source of income after an employee, who otherwise would not be entitled to retirement benefits, retires because of permanent disability. Third, they are not a subterfuge, not only because they predate passage of the ADEA, but because they do not discourage the hiring of older workers. Indeed, Betts was hired at the age of fifty-five and if not for her illness, would have been *entitled* to remain at her job. The plain language of section 4(f)(2), therefore, mandates that PERS disability retirement benefits be exempted from the proscriptions of the ADEA.

B. The Legislative History Associated With Section 4(f)(2), As Originally Enacted, Does Not Support The Conclusion That Age-Related Cost Considerations Are A Component Of The Section 4(f)(2) Exemption.

In 1964, Congress directed the Secretary of Labor to conduct an exhaustive study of the issue of age discrimination in the workplace and to present the results, as well as recommendations, to facilitate future congressional action to eliminate "arbitrary" age discrimination in employment. 42 U.S.C. § 2000e-14 (1964). (Repealed 1972.) (a-8.) When issued, the Secretary's Report indicated that three factors were at the core of work-related age discrimination: (1) unfounded assumptions about the effect of age on ability to perform; (2) actual relationships between age and ability to do a job; and (3) "institutional arrangements" – employee benefit plans, such as pensions, seniority systems, and insurance arrangements. Although his report identified all three factors as the reasons underlying age discrimination in employment, the Secretary expressly identified only the first factor, decision-making based on unfounded assumptions concerning age and ability, as what Congress meant by "arbitrary age discrimination." *See "The Older American Worker: Age Discrimination in Employment," Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964* (1965) ("Secretary's Report"), at 2; *see also EEOC Legislative History*, at 20.

Another finding in the Secretary's Report was that "[i]t is not clear to what extent [reluctance to hire older workers] arise[s] directly from cost factors and to what extent they are the result of plan operations largely unrelated to costs." *Secretary's Report*, at 16, *reprinted in EEOC Legislative History*, at 33. The Secretary reported that "cost

considerations do not . . . always operate against the older worker" and that "[r]elatively few employers . . . cited the costs of providing pension and insurance benefits as significant barriers to employment of older persons. . . . [W]hat was cited was the company policy for excluding new employees beyond a certain age from coverage under pension plans . . . and in the case of insurance presumed inability to pass physical examinations." *Id.* at 16-17, *reprinted in EEOC Legislative History*, at 33-34.

In light of the Secretary's Report, several senators, led by Senator Javits, attempted to have the FLSA amended to eliminate age discrimination in respect to "terms, conditions, or privileges" of employment, except where age was an essential element of performance. *See* Senate Amendment No. 714 to H.R. 1371, 89th Cong., 2d Sess. (1966), *reprinted in EEOC Legislative History*, at 43.[16] Their effort, however, proved unsuccessful. Nevertheless, Congress directed the Secretary to prepare suggested legislation designed "to prevent arbitrary discrimination in employment because of age. . . ." *See* Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 606, 80 Stat. 830 (1966). (a-8.)

The Secretary responded on January 23, 1967, to Congress' directive by submitting the Johnson Administration's version of the ADEA. *See* 113 Cong. Rec. 1377 (Jan.

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[16] Senators Javits, Murphy, Prouty and Griffin characterized "the imposition of arbitrary age limits on *hiring* . . . [as] the most serious, the most wasteful, and the least justifiable aspect of" age discrimination in employment. S. Rep. No. 1487, 89th Cong., 2d Sess. 79 (1966), *reprinted in EEOC Legislative History*, at 48. (Emphasis added.)

24, 1967), *reprinted in EEOC Legislative History*, at 62-63. Introduced by Senator Yarborough, the Administration's draft was aimed at "arbitrary" age discrimination in employment. It included the following narrow version of section 4(f)(2):

> It shall not be unlawful for an employer, employment agency, or labor organization –
> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act[.]

113 Cong. Rec. 2794 (Feb. 7, 1967), *reprinted in EEOC Legislative History*, at 68.

Senator Javits, who previously had introduced his own bill, S. 788, was disturbed by the limited protection offered to employee benefit plans under the Administration's version of section 4(f)(2):

> the age discrimination law *should not be used as the place to fight the pension battle* but . . . we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment.

Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (March 14, 1967) ("*Senate Hearings*"). (Emphasis added.) It was Senator Javits' intention to offer an amendment to the Administration's bill to afford employers "a degree of flexibility" in the area of employee benefit plans. *Id.* According to the Senator, a "fairly broad exemption . . . for bona fide retirement and seniority systems [was necessary] to facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." *Id.* at 28.

Senator Smathers, a co-sponsor of the Administration bill, also proposed an amendment to the age discrimination law:

> (g) Nothing in this Act shall be construed to make unlawful the varying of coverage under any pension, retirement, or insurance plan or any plan for providing medical or hospital benefits or benefits for work injuries, where such variance is necessary to prevent the employer's being required to pay more for coverage of an employee than would be required to provide like coverage for his other employees.

Id. at 30. Senator Smathers' proposal, however, was not included by Congress in the ADEA.

Finally, Senator Murphy expressed support for the bill Senator Javits and he unsuccessfully sponsored in 1966, which made no provision for an exemption of any kind for employee benefit plans. *Senate Hearings*, at 32. He directed the committee's attention to the Secretary of Labor's conclusion that the cost of providing pension and insurance benefits was cited infrequently by employers as a deterrent to the hiring of older workers and a finding of the Bureau of Labor Statistics that the costs of health and insurance plans do not vary greatly with age. Senator Murphy suggested, therefore, that the cost associated with providing employee benefits to older workers was exaggerated. *Id.* at 34.

Despite reassurances by the Secretary of Labor that the Administration's version of section 4(f)(2) would offer broad protection to employee benefit plans, *see id.* at 53, Senator Javits, apparently parting company on this issue with his former ally, Senator Murphy, was still concerned that the Administration's bill would disrupt employee benefit plans and would have the unintended effect of discouraging the employment of older workers. *See* 113 Cong. Rec. 7076 (March 16, 1967), *reprinted in*

EEOC Legislative History, at 71. Senator Javits offered the following substitute for the Administration's version of section 4(f)(2), providing that an employer would still be in compliance with the new age discrimination law if he observed

> a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of the Act, except that no such retirement, pension, employee benefit, or insurance plan shall excuse the failure to hire any individual.

113 Cong. Rec. 7076 (March 16, 1967), *reprinted in EEOC Legislative History*, at 72. It was not Senator Javits' intention to dismiss the importance to older workers of receiving adequate employee benefits. *See id.*, *reprinted in EEOC Legislative History*, at 71. He reiterated, however, that "the age discrimination law is not the proper place to fight this particular battle." *Id.*

Significantly, at the time Congress was deliberating over the age discrimination law, Senator Javits had "introduced a comprehensive bill to deal with . . . [the pension] problem." *Id.* The bill, which predated ERISA, identified each of the following items as an "employee benefit plan":

> any plan providing for the payment of any of . . . the following benefits: Medical or hospital care, pension on retirement or death of employees, benefits under a profit-sharing retirement plan, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, accident benefits, or pooled vacation, holiday, severance or similar benefits, or defraying the cost of apprenticeship training programs, or, in the case of a fund subject to the restrictions of section 302(c) of the Labor-Management Relations Act, providing any

> other benefit which may be permitted by subsections 302(c)(5) or 302(c)(6) of that Act[.]

S. 1103, 90th Cong., 1st Sess. 2-3 (1967). Two other bills introduced on this subject, one by Senator Yarborough, also defined the phrase "employee benefit plan" quite broadly. *See* H.R. 5741, 90th Cong., 1st Sess. (1967); S. 1024, 90th Cong., 1st Sess. (1967).

The version of section 4(f)(2) that emerged from committee contained the following language, still part of the ADEA today:

> It shall not be unlawful for an employer, employment agency, or labor organization . . .
>
> * * *
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this [chapter], except that no such employee benefit plan shall excuse the failure to hire any individual. . . .

See H.R. 13054, at 6, published in H.R. Rep. No. 805, 90th Cong., 1st Sess. 4 (1967), *reprinted in EEOC Legislative History*, at 94. The House Committee report explained in unequivocal terms the purpose and scope of the exemption:

> It is important to note that [section 4(f)(2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill – hiring of older workers – by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vita[l] to the legislation, and was favorably received by witnesses at the hearings.

H.R. Rep. 805, *reprinted in EEOC Legislative History*, at 77. The bill next was reported favorably to the Senate and

accompanied by a Senate committee report addressing essentially in the same terms the justifications underlying the exemption. *See* S. Rep. No. 723, 90th Cong., 1st Sess. 4 (November 4, 1967), *reprinted in EEOC Legislative History*, at 108.

Senator Javits applauded the Committee's results, noting how "the bill . . . [had] . . . been improved by the adoption of language . . . exempting . . . bona fide seniority systems and retirement, pension, or other employee benefit plans from its prohibitions. The lack of any such provision was a serious defect [in the Administration's bill]. . . ." Individual views of Senator Javits, S. Rep. No. 723, 90th Cong., 1st Sess. 4, 14 (1967), *reprinted in EEOC Legislative History*, at 118. Javits continued that in the "absence [of such a provision] employers might actually have been discouraged from hiring older workers because of the increased costs involved in providing certain types of benefits to them." *Id.*

The broad scope of this latest version of section 4(f)(2) was communicated to the Senate by Senator Javits during a discussion with Senator Yarborough, the floor manager of the bill. *See* 113 Cong. Rec. 31255 (Nov. 6, 1967), *reprinted in EEOC Legislative History*, at 146 (of importance to the business community was the fact that employers "will not be compelled . . . to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act. . . ."). Members of the House, including Representative Perkins, floor manager of House Bill H.R. 13054, also demonstrated that they were aware that section 4(f)(2), as amended, would apply to the full range of employee benefit plans, even those that excluded older workers. *See*

remarks of Representative Perkins, 113 Cong. Rec. 34740 (December 4, 1967), *reprinted in EEOC Legislative History*, at 151. (ADEA provided "exceptions to prevent disruption of employee benefit programs, seniority systems and the like"). *See also* remarks of Representative Randall, 113 Cong. Rec. 34750 (December 4, 1967), *reprinted in EEOC Legislative History*, at 161 (ADEA contained "no provision for [older workers] . . . to participate in some of the pension or retirement programs available to [his] fellow workers"). At least one member of the House opposed the new age discrimination law precisely because it allowed older workers to be excluded entirely from existing benefit plans. *See* remarks of Representative Smith, 113 Cong. Rec. 34745 (December 4, 1967), *reprinted in EEOC Legislative History*, at 156. Despite these concerns, the bill, including the amended version of section 4(f)(2), was passed in both houses of Congress and signed into law by the President.

The preceding legislative history reflects that in 1967 Congress, first and foremost, wished to address misconceptions concerning the competence of older workers. The legislature was intent on eliminating this "arbitrary" age discrimination by requiring the hiring of employees regardless of age.

But Congress was also sensitive to the needs of employers and willing to compromise on the issue of employee benefits in order to facilitate hiring. Thus, Congress chose not to utilize the ADEA as a weapon for "fighting the pension battle." Instead, it created an exemption for bona fide employee benefit plans designed to encourage the cooperation of employers.

The scope of this exemption did not evolve without debate. Congress had before it several alternative versions of the exemption, including the offerings of the

Administration, Senator Smathers, and Senator Javits. In addition, Congress had the option of abandoning altogether the idea of an exemption, the route apparently favored by Senator Murphy.

Senator Murphy's view, however, garnered little support. In addition, neither the Administration's proposal, which was narrower in scope than the amendment offered by Senator Javits, nor Senator Smathers' suggested amendment, which gave Congress the opportunity to embrace the "age-related costs" test as the exclusive method for satisfying the terms of the exemption, were adopted.

Instead, Congress passed, with modest stylistic changes, Senator Javits' proposal. This version of section 4(f)(2) clearly was the most expansive. Legislative debate reveals that members of Congress understood that the Javits amendment might result in the exclusion[17] of older workers from various benefit plans. Moreover, Senator Javits' concept of what qualified as an "employee benefit plan" was evident from the definition of that term contained in the pension bill he proposed almost simultaneously with the introduction of his version of section 4(f)(2).

It is true that the reason an employee benefit plan exemption was necessary may have varied from legislator to legislator. One of Senator Javits' concerns appears

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[17] No one is excluded from membership in the Public Employees Retirement System because of age. Although a worker age sixty or older may not apply for disability retirement benefits, he is eligible for age and service retirement benefits regardless of his age at the time he was hired, provided, as is true of all PERS members, he has accumulated at least five years of service credit. *See* O.R.C. § 145.33. (a-13.)

to have been employer costs, while there is significant evidence that the practice of excluding older persons from pension plans was the employer concern that the exemption was intended to address.

Whether the exemption was designed to deal with one or a combination of these factors, Congress wanted to dismantle barriers to the hiring of older workers. It did so by making it unlawful for employers to refuse to hire anyone because of age and by exempting from the Act's coverage the full panoply of employee benefit plans that otherwise might have discouraged employers from becoming full partners in the effort to eliminate arbitrary age discrimination. The overwhelming tone of the legislative history to the ADEA as originally enacted refutes any suggestion that Congress intended to limit this partnership by restricting the universe of employee benefit plans included within the perimeters of the exemption to those whose different treatment of older workers was predicated on age-related cost considerations.

C. The Legislative History Associated With The 1978 Amendment To Section 4(f)(2) May Not Be Relied On To Interject An Age-Related Cost Considerations Requirement Into Section 4(f)(2).

As with the Sixth Circuit's conclusion concerning the continuing vitality of *McMann*, whatever authority there might be for the appellate court's position concerning age-related cost considerations must be gleaned from the legislative history of the 1978 amendment invalidating involuntary retirement provisions. The 1978 amendment to section 4(f)(2) had its genesis in a conflict between the courts of appeals. The Third and Fifth Circuits had ruled that involuntary retirement provisions were lawful under

section 4(f)(2). *See Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974) and *Zinger v. Blanchette*, 549 F.2d 217 (4th Cir. 1976). The Fourth Circuit took the opposite view. *See McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976).

On July 25, 1977, the House Committee on Education and Labor suggested an amendment to section 4(f)(2) prohibiting involuntary retirement because of age. *See* H.R. 5383, 95th Cong., 1st Sess. (July 25, 1977), *reprinted in EEOC Legislative History*, at 392. The committee made it clear that its bill would "not require any additional benefits, benefit accruals or actuarial adjustments . . . other than those required under ERISA." *See* H.R. Rep. No. 527, 95th Cong., 1st Sess. 8-9 (1977), *reprinted in EEOC Legislative History*, at 361. Representative Weiss expressed the view that the sole effect of the amendment would be to make involuntary retirement unlawful. *See id.* at 26-30, *reprinted in EEOC Legislative History*, at 386-90. Representative Weiss contended that prohibiting involuntary retirement was consistent with the statute's original purposes of promoting employment of older workers without disrupting existing plans. *Id.* at 26-27, *reprinted in EEOC Legislative History*, at 386-87. Employers would still be authorized to establish the "age at which full benefits are received," as well as "the amount of benefits" because the "amendment to section 4(f)(2) does not effect [sic] the cost or structure of bona fide pension plans which conform to ERISA or other IRS regulations." *Id.* at 28-29, *reprinted in EEOC Legislative History*, at 388-89.

The Senate Committee on Labor and Human Resources reported a similar bill to the Senate on October 12, 1977. *See* H.R. 5383, 95th Cong., 1st Sess. (1977). The Senate committee report expressed its approval of the

result reached by the Fourth Circuit in *McMann*, invalidating an involuntary retirement provision. *See* S. Rep. No. 493, 95th Cong., 1st Sess. 9-10 (1977), *reprinted in EEOC Legislative History*, at 434. The committee also stated that

> [P]resently some employers reduce coverage for older workers under these plans or increase the required employee contribution as workers advance in age. This bill would not alter existing law with respect to these practices. Existing principles of law, including the 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, would be the standard by which these practices will be evaluated.

Id. at 5, *reprinted in EEOC Legislative History*, at 438.

Senator Williams, floor manager of the bill in the Senate stated that:

> Under section 4(f)(2) of the act, an employer is not compelled to afford older workers exactly the same pension, retirement or insurance benefits as he affords younger workers, provided that any difference in these benefits is not a subterfuge for age discrimination. This bill would not alter existing law with respect to these practices.
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> * * *
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> . . . [t]he purpose of this exception is to facilitate the hiring of older workers by permitting their employment without necessarily requiring an employer to provide equal benefits to them under retirement, insurance or disability benefit plans. Of course, there must be some reason other than age which justifies the unequal benefits. . . . But the application of a mandatory retirement provision contained in a seniority system or employee benefit plan makes no such valid distinction. Rather it takes away an individual's right to employment solely because of his or her age. That is age discrimination plain and simple[.]

123 Cong. Rec. 34295 (Oct. 19, 1977), *reprinted in Legislative History*, at 482. Senator Kennedy expressed similar views:

> [The amendment to section 4(f)(2)] clarifies the congressional intention behind the exception to the act which allows lesser benefits to be given to older workers in pension, retirement, and insurance plans. The purpose of this provision was to ease the way for employment of older workers by allowing some differentiation in the fringe benefits that they would get. . . . We now make it clear that the differentiation is allowed for purposes of fringe benefits alone and is not for purposes of allowing an earlier retirement age.

123 Cong. Rec. 34323 (Oct. 19, 1977), *reprinted in EEOC Legislative History*, at 510.

While a House-Senate conference committee was considering each chamber's bill, the Supreme Court issued its decision in *McMann*. Several months thereafter, the Conference Committee released its report, including the remarks alluded to in the Sixth Circuit's opinion in this case and discussed earlier in this brief:

> The conferees agree that *the purpose of the amendment* to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that *the exception does not authorize an employer to require or permit involuntary retirement*. . . . In *McMann v. United Airlines*, 98 S. Ct. 244 (1977), the Supreme Court held to the contrary. . . . The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8 (March 14, 1978), *reprinted in EEOC Legislative History*, at 519. (Emphasis added.)

Floor debate of the bill approved by the conference committee began in the House when Representative Hawkins called up the Conference Committee report on March 21, 1978. *See* 124 Cong. Rec. 7880 (March 21, 1978), *reprinted in EEOC Legislative History*, at 527. In the words of Mr. Hawkins, "the purpose of this amendment is to make absolutely clear that [section 4(f)(2)] does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age." 124 Cong. Rec. 7881 (March 21, 1978), *reprinted in EEOC Legislative History*, at 528. He noted further that "[c]ontrary to the Supreme Court's rationale, this amendment makes clear that regardless of when an involuntary retirement provision in a plan became effective – before or after the enactment of the ADEA or of these amendments – it is unlawful if it is triggered by the fact that an employee reaches an age within the protected group." *Id.* Representative Weiss concurred in this assessment. *See* 124 Cong. Rec. 7887 (March 21, 1978), *reprinted in EEOC Legislative History*, at 534.

Finally, Representative Waxman, a co-author of the 1978 amendment to section 4(f)(2), noted that the amendment prohibited involuntary retirement. He further noted that in originally enacting section 4(f)(2), "Congress feared that requiring participation of older workers in benefit plans would discourage employment of newly hired older workers." 124 Cong. Rec. 7888 (March 21, 1978), *reprinted in EEOC Legislative History*, at 535. But Representative Waxman was "hopeful" that the 1978 amendment prohibiting involuntary retirement provisions would not lead "employers [to] terminate capable and healthy older workers from benefit plans solely on the basis of age. . . ." *Id.* Representative Waxman based

this "hope" on his opinion that, "[i]n the absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy constitutes discrimination and a conscious effort to evade the purpose of the Act." *Id.* He conceded, however, that, in 1978, "the conference committee did not specifically address the status of health benefits to older workers protected by this act. . . ." *Id.*

In the Senate, Senator Williams called up the Conference Committee report and explained that the amendment insured that "pension plans or seniority systems which require mandatory retirement may no longer be applied to employees covered by the act." 124 Cong. Rec. 8217 (March 23, 1978), *reprinted in EEOC Legislative History*, at 538. Senator Javits then stated that "[t]he amendment to the section 4(f)(2) exception is intended to overrule the *McMann* decision" and to make involuntary retirement unlawful. 124 Cong. Rec. 8218-19 (March 23, 1978), *reprinted in EEOC Legislative History*, at 539. Finally, Senator Javits stated:

> I want to emphasize that these amendments do not change present law regarding these practices, as the Senate report states:
>
> Existing principles of law, including the section 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, would be the standard by which these practices will be evaluated.
>
> The purpose of Section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.
>
> Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus, a retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage. This is consistent with the following statement I made during the November 6, 1967 floor consideration of the original act[.]

This legislative history, including Senator Javits' final comment,[18] cannot properly be used to add an age-related cost considerations limitation to the section 4(f)(2) exemption. The legislative debate principally focused on the involuntary retirement issue. Those voting for the amendment purported only to be rendering involuntary retirement provisions unlawful. They did not purport to be addressing the lawfulness of any other employee benefit plan practice. On the contrary, it was stressed that, with the exception of abolishing involuntary retirement provisions, the amendment to section 4(f)(2) "would not alter existing law with respect to these practices." *See e.g.*, S. Rep. No. 493, 95th Cong., 1st Sess. 5 (1977), *reprinted in EEOC Legislative History*, at 438; 123 Cong. Rec. 34295 (October 19, 1977), *reprinted in EEOC Legislative History*, at 482. That existing law included an appellate decision expressly rejecting the age-related cost considerations limitation. *See Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215-17 (5th Cir. 1974).

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[18] Because Senator Javits was a principal sponsor in 1967 of section 4(f)(2), it may seem that his views should be afforded some weight. *See Consumer Product Safety Commission*, 447 U.S. at 118-19. But, "as time passes, memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Id.* at 118 n. 13.

It is true that in discussing their support for the 1978 amendment, several members of Congress offered their own interpretations of the extent of the section 4(f)(2) exemption, suggesting that a plan providing unequal benefits must have some reason other than age as a justification for the differentiation; indeed, Senator Javits and Representative Waxman suggested that these benefit variances must have age-related cost justifications. But these comments were not directed to the meaning of the amendment that Congress was enacting in 1978. Rather, they were directed to the meaning of section 4(f)(2) as originally enacted in 1967. Such "[l]egislative observations 10 years after passage of the Act are in no sense part of the legislative history" of the 1967 enactment. *McMann*, 434 U.S. at 200 n. 7. Thus, they cannot be used to modify the otherwise clear meaning of the original statutory language. *Id. Accord, Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979); *see also Mackey v. Lanier Collections Agency & Service, Inc.*, ___ U.S. ___, 108 S. Ct. 2182, 2190 (1988); *Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977).

Although a plan does not have to be predicated on age-related cost considerations[19] in order to qualify for

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[19] Even if an age-related cost considerations theory was adopted as a rule of general application, PERS disability retirement benefits should still be entitled to the protections of section 4(f)(2) because they are an integral component of a bona fide retirement and pension plan. *See, e.g., Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *EEOC v. Westinghouse*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984).

the exemption, an employer with a bona fide employee benefit plan would still have to demonstrate that the plan is not a "subterfuge to evade the purposes of" the ADEA. But the inquiry would turn, as reflected by the "intent" component of section 4(f)(2), on subjective, as well as objective factors. *See McMann*, 434 U.S. at 203; *accord, EEOC v. Mt. Lebanon, Pennsylvania*, 842 F.2d 1480, 1494-95 (3d Cir. 1988). (Hutchinson, J., concurring.)[20] Although data concerning the cost of a program may be relevant evidence, the fact that differences in the treatment of older and younger workers are not the product of age-related cost considerations should not preclude an employer from demonstrating through other evidence that a plan was not intentionally designed to circumvent the purposes of the ADEA.[21]

The purposes of the ADEA are contained in Section 2(b) of the Act, 29 U.S.C. § 621(b):

> to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Thus, an otherwise bona fide employee benefit plan is a subterfuge to evade the purposes of the ADEA when it is

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[20] The majority of the Third Circuit panel in *Mt. Lebanon* relied on age-related cost considerations to reverse the district court's grant of summary judgment for an employer with a post-1967 plan.

[21] One way in which an employer could demonstrate that its plan is not a subterfuge to evade the purposes of the ADEA would be through evidence that the plan predated the passage of the Act. *McMann*, 434 U.S. at 203.

utilized to frustrate the efforts of a person protected by the ADEA to secure or retain employment or qualify for promotion because of age, or to perpetuate misconceptions about age and ability. Any employer who utilizes a plan with either or both of these illicit goals in mind should forfeit the protections of section 4(f)(2).

PERS disability retirement benefits, however, are not designed to evade the purposes of the ADEA. As the district court noted, they are intended to provide income for permanently disabled workers who otherwise would have no source of income. They do not discourage the hiring, retention, or promotion of older workers, as evidenced by the fact that Betts was hired at the age of fifty-five and was retained as long as her health permitted. Affording the protection of section 4(f)(2) to PERS' plan will fully serve the purposes of the ADEA without constricting the scope of the exemption in a manner inconsistent with its plain language and legislative history.

CONCLUSION

For the reasons set forth above, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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29 U.S.C. § 207

(e) Definition of "regular rate" of employment

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include-

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such

talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

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29 U.S.C. § 302 (1958) (Repealed 1974)

DEFINITIONS

Sec. 2. (a) When used in this Act-

(1) The term "employee welfare benefit plan" means any plan, fund, or program which is communicated to or its benefits described in writing to the employees, and which was heretofore or is hereafter established by an employer or by an employee organization, or by both, for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment.

(2) The term "employee pension benefit plan" means any plan, fund, or program which is communicated or its benefits described in writing to the employees, and which was heretofore or is hereafter established by an employer or by an employee organization, or by both for the purpose of providing for its participants or their beneficiaries by the purchase of insurance or annuity contracts or otherwise, retirement benefits, and includes any profit-sharing plan which provides benefits at or after retirement.

(3) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee welfare or pension benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary

association organized for the purpose, in whole or in part, of establishing such a plan.

(4) The term "employer" means any person acting directly as an employer or indirectly in the interest of an employer in relation to an employee welfare or pension benefit plan, and includes a group or association of employers acting for an employer in such capacity.

(5) The term "employee" means any individual employed by an employer.

(6) The term "participant" means any employee or former employee of an employer or any member of an employee organization who is or may become eligible to receive a benefit of any type from an employee welfare or pension benefit plan, or whose beneficiaries may be eligible to receive any such benefit.

(7) The term "beneficiary" means a person designated by a participant or by the terms of an employee welfare or pension benefit plan who is or may become entitled to a benefit thereunder.

(8) The term "person" means an individual, partnership, corporation, mutual company, joint-stock company, trust, unincorporated organization, association, or employee organization.

(9) The term "State" means any State of the United States, the District of Columbia, Hawaii, Puerto Rico, the Virgin Islands, and the Canal Zone.

(10) The term "commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place outside thereof.

(11) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce.

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29 U.S.C. § 623(a)(1)

It shall be unlawful for an employer –

to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

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29 U.S.C. § 623(f)(2)

It shall not be unlawful for an employer, employment agency, or labor organization –

* * *

to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.

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29 U.S.C. § 1002(2)(A)(i)

Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program –

(i) provides retirement income to employees,

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41 U.S.C. § 351(a)(1) and (2)

Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such

wages be lower than the minimum specified in subsection (b) of this section.

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

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42 U.S.C. § 2000e-14 (1964) (Repealed 1972)

The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected. The Secretary of Labor shall make a report to the Congress not later than June 30, 1965, containing the results of such study and shall include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable.

Fair Labor Standards Amendments of 1966, Pub. L. 89-601, § 606, 80 Stat. 830 (Sept. 23, 1966)

The Secretary of Labor is hereby directed to submit to the Congress not later than January 1, 1967 his specific legislative recommendations for implementing the conclusions and recommendations contained in his report on age discrimination in employment made pursuant to section 715 of Public Law 88-352. Such legislative recommendations shall include, without limitation, provisions specifying appropriate enforcement procedures, a particular administering agency, and the standards, coverage, and exemptions, if any, to be included in the proposed enactment.

Pub. L. 95-256, § 2(a) and (b), 92 Stat. 189 (1978)

SEC. 2. (a) Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(f)(2)) is amended by inserting after "individual" a comma and the following: "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual".

(b) The amendment made by subsection (a) of this section shall take effect on the date of enactment of this Act, except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938), and which would otherwise be prohibited by the amendment made by section 3(a) of this Act, the amendment made by subsection (a) of this section shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first.

Ohio Rev. Code § 145.23

The funds hereby created are the employees' savings fund, the employers' accumulation fund, the annuity and pension reserve fund, the income fund, the survivors' benefit fund, and the expense fund.

(A) The employees' savings fund is the fund in which shall be accumulated contributions from the earnable salaries of contributors for the purchase of annuities or retirement allowances.

The accumulated contributions of a contributor returned to him upon his withdrawal, or paid to his estate or designated beneficiary in the event of his death, shall be paid from the employees' savings fund. Any accumulated contributions forfeited by failure of a member, or his estate, to claim the same, shall be transferred from the employees' savings fund to the income fund. The accumulated contributions of a contributor shall be transferred from the employees' savings fund to the annuity and pension reserve fund in the event of his retirement.

(B) The employers' accumulation fund is the fund in which shall be accumulated the reserves for the payment of all pensions payable as provided in this chapter. The amounts paid by the state of Ohio and by any employer defined in division (A) of section 145.01 of the Revised Code because of the normal contributions and deficiency contributions shall be credited to the employers' accumulation fund.

Any payments made into the employers' accumulation fund by a member as provided in section 145.31 of the Revised Code shall be refunded to such member under the conditions specified in section 145.40 of the Revised Code.

Upon the retirement of a contributor the full amount of his pension reserve shall be transferred from the employers' accumulation fund to the annuity and pension reserve fund.

(C) The annuity and pension reserve fund is the fund from which shall be paid all pensions, retirement allowances, annuities, and benefits in lieu thereof,

because of which reserves have been transferred from the employees' savings fund and the employers' accumulation fund.

Any member may deposit in the employees' savings fund, subject to rules established from time to time by the public employees retirement board, such amounts as the member desires, and the member, at the time of age and service or commuted age and service retirement, shall receive in return therefor, at the option of the member, either an annuity having a reserve equal to the amount deposited or a cash refund of such amounts together with such interest as may have been allowed by the public employees retirement board at the end of each calendar year. Such deposits for additional annuity together with such interest as may have been allowed by the public employees retirement board at the end of each calendar year shall be refunded in the event of death prior to retirement or withdrawal of accumulated contributions as provided in sections 145.40 and 145.43 of the Revised Code or upon application of the member prior to age and service retirement.

(D) The income fund is the fund from which interest is transferred and credited on the amounts in the funds described in divisions (B), (C), and (F) of this section, and is a contingent fund from which the special requirements of the funds may be paid by transfer from this fund. All income derived from the investment of funds by the public employees retirement board as trustee under section 145.11 of the Revised Code, together with all gifts and bequests, or the income therefrom, shall be paid into this fund.

Any deficit occurring in any other fund which will not be covered by payments to that fund, as otherwise provided in Chapter 145. of the Revised Code, shall be paid by transfers of amounts from the income fund to such fund or funds. If the amount in the income fund is insufficient at any time to meet the amounts payable therefrom, the amount of the deficiency, with regular interest, shall be paid by an additional employer rate of contributions as determined by the actuary, not to exceed fourteen per cent, and the amount of the additional employer contribution shall be credited to the income fund.

The public employees retirement board may accept gifts and bequests. Any funds that may come into possession of the public employees retirement board in this manner, or which may be transferred from the employees' savings fund by reason of lack of claimant, or any surplus in any fund created by this section, or any other funds whose disposition is not otherwise provided for, shall be credited to the income fund.

(E) The expense fund is the fund from which shall be paid the expenses of the administration of this chapter, exclusive of amounts payable as retirement allowances and as other benefits.

(F) The survivors' benefit fund is the fund from which shall be paid dependent survivor benefits provided by section 145.45 of the Revised Code.

Ohio Rev. Code § 145.33

(A) A member, other than a member who qualifies for and elects to receive benefits under division (B), (C), or (E) of this section, with at least five years of total service credit and who has passed his sixtieth birthday, or who has thirty years of total Ohio service credit, may apply for age and service retirement which shall consist of:

(1) An annuity having a reserve equal to the amount of the member's accumulated contributions at that time;

(2) A pension equal to the annuity provided by division (A)(1) of this section;

(3) An additional pension, if the member can qualify for prior service, equal to forty dollars multiplied by the number of years, and fraction thereof, of such prior and military service credit;

(4) A basic annual pension equal to one hundred and eighty dollars, if the member has ten or more years of total service credit as of October 1, 1956, except that such basic annual pension shall not exceed the sum of the annual benefits provided by divisions (A)(1), (2), and (3) of this section. The cost of such basic annual pension shall be included in the deficiency contribution provided by sections 145.48 and 145.50 of the Revised Code.

(5) When a member retires on age and service retirement, his total annual single lifetime allowance, including the allowances provided in divisions (A)(1), (2), (3), and (4) of this section, shall be not less than a base amount determined by multiplying his total Ohio service

credit by the greater of eighty-six dollars or two and one-tenth per cent of his final average salary, which shall be adjusted by the factors of attained age or years of service to provide the greater amount as determined by the following schedule:

Attained Birthday	Or	Years of Total Service Credit	Percentage of Base Amount
58		25	75
59		26	80
60		27	85
61			88
		28	90
62			91
63			94
		29	95
64			97
65		30 or more	100

Members shall vest the right to a benefit in accordance with the following schedule, based on the member's attained age by September 1, 1976:

Attained Birthday	Percentage of Base Amount
66	102
67	104
68	106
69	108
70 or more	110

(6) The total annual single lifetime allowance that a member shall receive under division (A)(5) of this section shall not exceed ninety percent of his final average salary.

(B)(1) A member who has at least twenty-five years of total service credit, including credit for military service

under division (D)(2) of this section, while serving as a township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent and who has passed his fifty-second birthday, may apply for an age and service retirement benefit, which shall consist of an annual single lifetime allowance equal to the sum of two and one-half percent of his final average salary multiplied by the first twenty years of his total service, plus two percent of his final average salary multiplied by each of his twenty-first to twenty-fifth years of service, plus one and one-half percent of his final average salary multiplied by the number of years of his total service credit in excess of twenty-five years, except that no allowance shall exceed seventy-two percent of his final average salary.

(2) A member who has at least fifteen years of total service credit, including credit for military service under division (D)(2) of this section, while serving as a township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent and has attained sixty-two years of age, may apply for an age and service retirement benefit which shall consist of an annual single lifetime allowance computed as provided in division (B)(1) of this section.

(C) A member with at least fifteen years of total service credit, including credit for military service under division (D)(2) of this section, while serving as a township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent and who voluntarily resigns or is discharged from his position for any reason except his retirement under this chapter, his death, dishonesty,

cowardice, intemperate habits, or conviction of a felony, may apply for an age and service retirement benefit which shall consist of an annual single lifetime allowance equal to one and one-half percent of his final average salary multiplied by the number of years of his total service credit. This allowance shall commence on the first day of the calendar month following the month in which the application is filed with the public employees retirement board on or after the attainment by the applicant of age fifty-two.

(D)(1) If after March 4, 1975, a member withdraws any part or all of his accumulated contributions from the employees' savings fund, he shall forfeit any right to a pension under division (B) or (C) of this section. A member enrolled in division (B) or (C) of this section may elect to receive benefits under division (A) of this section if his service credit, either jointly or independently, would qualify for benefits under division (A) of this section.

(2) Notwithstanding sections 145.01 and 145.30 of the Revised Code, no more than four years of military service credit granted under section 145.30 of the Revised Code and five years of military service credit purchased under section 145.301 [145.30.1] of the Revised Code shall be used in calculating service as a township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent, or the total service credit of such person.

(3) Only credit for his service as a deputy sheriff, sheriff, or township constable or police officer in a township police department or district, or county narcotics agent, or service credit purchased as a policeman or state

highway patrolman shall be used in computing the benefits under divisions (B), (C), and (E) of this section for any person who is originally commissioned and employed as a deputy sheriff by the sheriff of any county, or who is originally elected sheriff, on or after January 1, 1975, any person who is originally appointed as a township constable or police officer in a township police department or district, on or after January 1, 1981, and any person who is originally employed as a county narcotics agent on or after September 26, 1984.

(E) A member who has at least twenty-five years of total service credit, including credit for military service under division (D)(2) of this section, while serving as a township constable, police officer in a township police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent and who voluntarily resigns or is discharged from his position for any reason except his retirement under this chapter, his death, dishonesty, cowardice, intemperate habits, or conviction of a felony, may, on or after the date he attains forty-eight years of age but before the date he attains fifty-two years of age, elect to receive a reduced benefit as determined by the following schedule:

ATTAINED AGE	*REDUCED BENEFIT*
48	seventy-five per cent of the benefit payable under division (B) of this section
49	eighty per cent of the benefit payable under division (B) of this section
50	eighty-six per cent of the benefit payable under division (B) of this section

51 ninety-three per cent of the benefit payable under division (B) of this section

A member who has at least twenty-five years of total service credit, including credit for military service under division (D)(2) of this section, while serving as a township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent may, upon attaining forty-eight, forty-nine, fifty, or fifty-one years of age, elect to retire and receive a reduced benefit determined by the above schedule.

In the case of a member who elects to receive a reduced benefit on or after the date he attains forty-eight years of age but before the date he attains forty-nine years of age, the reduced benefit is payable from the date he attained forty-eight years of age or from the date he becomes eligible to receive the reduced benefit, whichever is later. In the case of a member who elects to receive a reduced benefit on or after the date he attains forty-nine years of age but before the date he attains fifty years of age, the reduced benefit is payable from the date he attained forty-nine years of age or from the date he becomes eligible to receive the reduced benefit, whichever is later. In the case of a member who elects to receive a reduced benefit on or after the date he attains fifty years of age but before the date he attains fifty-one years of age, the reduced benefit is payable from the date he attained fifty years of age or from the date he becomes eligible to receive the reduced benefit, whichever is later. In the case of a member who elects to receive a reduced benefit on or after the date he attains fifty-one years of

age but before the date he attains fifty-two years of age, the reduced benefit is payble from the date he attained fifty-one years of age or from the date he becomes eligible to receive the reduced benefit, whichever is later.

Once a member elects to receive a reduced benefit determined by the above schedule and has received a payment, he may not reelect to change such election.

If a member who has resigned or been discharged has left on deposit his accumulated contributions in the employees' savings fund and has not elected to receive a reduced benefit determined by the above schedule, he shall, upon attaining fifty-two years of age, be entitled to receive a benefit computed and paid under division (B) of this section.

Ohio Rev. Code § 145.34

Any member who has completed twenty-five years of total service and has attained his fifty-fifth birthday, may retire on a commuted age and service allowance. Upon retirement on a commuted age and service allowance on or after September 30, 1963, a member shall be granted a retirement allowance consisting of:

(A) An annuity having a reserve equal to the amount of the member's accumulated contributions at that time;

(B) A pension equal to the annuity provided by division (A) of this section;

(C) An additional pension, if such member can qualify for prior service credit, the reserve for which, based upon regular interest and the service tables approved by the board, shall be the present worth of the reserve required for the payment of the prior service pension provided by section 145.33 of the Revised Code, after either sixty years of age or thirty years of Ohio service credit, whichever can be attained first. The annual prior service pension shall be determined by the amount of such commuted reserve divided by the age and service annuity rate for the attained age at retirement;

(D) The commuted value calculated as provided in division (C) of this section of a basic annual pension of one hundred eighty dollars, providing the member has ten or more years of total service credit as of October 1, 1956. The cost of the basic annual pension shall be included in the deficiency contribution.

(E) When a member retires on commuted age and service retirement, his single lifetime allowance shall not be less than that provided by divisions (A), (B), (C), and (D) of this section and division (A)(5) of section 145.33 of the Revised Code.

A year of service for the purpose of commuted age and service retirement and of applying the minimum retirement allowance as provided in this section is defined as a complete year of full-time employment, or the equivalent thereof. The board is the final authority in determining the eligibility of an employee for such form of retirment and for such minimum allowance.

In determining eligibility only for retirement under this section the board shall include in "total service" the

years of prior service credit granted members of the public employees retirement system by a publicly-owned utility as provided for in section 145.48 of the Revised Code under a pension plan adopted by the publicly-owned utility.

Ohio Rev. Code § 145.35

Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement program. Application must be made within two years from the date the member's contributing service terminated, unless the disability has existed in some degree as evidenced by medical records, before the member's contributing service was terminated. Application may not be made by or for any person receiving age and service retirement benefits under section 145.33, 145.34, or 145.37 of the Revised Code or any person who, pursuant to section 145.40 of the Revised Code, has been paid the accumulated contributions standing to the credit of his individual account in the employees' savings fund. The application shall be made on a form provided by the public employees retirement board. Any member who is approved for disability retirement shall be placed on retirement as of the first day of the month immediately following the later of:

(A) The last day for which compensation was paid; or

(B) The attainment of eligibility for benefits provided under this section.

Medical examination of a member who has applied shall be conducted by a competent disinterested physician or physicians selected by the board to determine whether the member is mentally or physically incapacitated for the performance of duty by a disabling condition either permanent or presumed to be permanent. The disability must have occurred since last becoming a member or have increased since last becoming a member to such extent as to make the disability permanent or presumed to be permanent.

If the physician or physicians determine that the member qualifies for retirement by reason of disability, and the board concurs with such determination, the member shall be retired for disability and the action of the board shall be final.

In the event an employer files a disability retirement application to retire a member on disability retirement as a result of his having been separated from service because he is considered to be mentally or physically incapacitated for the performance of his present duty, and the physician or physicians selected by the board reports to the board that the member is physically and mentally capable of performing service similar to that from which he was separated and the board concurs in the report, the board shall so certify to the employer and the employer shall restore the member to his previous position and salary or to a similar position and salary.

Ohio Rev. Code § 145.36

Upon disability retirement, a retirant shall receive a retirement benefit in an annual amount which shall consist of:

(A) An annuity having a reserve equal to the amount of the retirant's accumulated contributions;

(B) A pension which shall be the difference between his annuity and an annual amount determined by multiplying the total service credit of the retirant, and in addition thereto the projected number of years and fractions thereof between the effective date of his disability retirement and attained age sixty, assuming continuous service, by eighty-six dollars and two and one-tenth per cent of his final average salary whichever is greater. Where the retirant does not retire for disability under the provisions of section 145.37 of the Revised Code and is receiving a disability retirement benefit from either the state teachers retirement system or the school employees retirement system, then the retirant shall not be eligible for service credit based upon the number of years and fractions thereof between the date of disability and attained age sixty as provided for in this division. In no case shall a disability retirement benefit be less than thirty per cent or more than seventy-five per cent of his final average salary.

A year of service for the pupose of disability retirement is a complete year of full-time employment, or the equivalent thereof. The public employees retirement board is the final authority in determining the eligibility of a member for such form of retirement.

Ohio Rev. Code § 145.381

(A) A former member receiving a retirement allowance, other than a disability allowance, from this system, and hereafter referred to as a retirant, may be elected to an office of this state or any political subdivision or employed, anything contained in Chapter 145. of the Revised Code to the contrary notwithstanding, provided that during an elective term of office, membership in the public employees retirement system is not permitted, except that retirants elected to an office of the state who were elected state officials when they retired may elect to establish membership in the system, or may elect to receive both the pension and the annuity portion of their retirement allowance and, if they so elect, may not establish membership in the system. If such an official elects to establish membership in the system, he shall be considered an employee as provided in division (C) of this section except that he need not have been retired for at least eighteen months. For purposes of this section, except when he elects otherwise under this division, a retirant who is retired for not less than two months and who is elected or appointed to an elective office of this state or any political subdivision is not considered employed, provided, the retirant who is reelected to the office which he previously held, shall be retired for not less than eighteen months. He shall continue to receive both the pension and the annuity portion of his retirement allowance while serving in an elective position; if however he submits in writing to the official of the state or subdivision with responsibility for the payment of

compensation for his elected office a waiver of the compensation to which he would otherwise be entitled, he shall continue to receive the full amount of his benefit under section 145.33 of the Revised Code.

(B) A retirant may be employed in a temporary capacity, not to exceed fifty-nine work days, or four hundred seventy-two hours, whichever is the lesser, within any calendar year, provided:

(1) The retirant has received a retirement allowance for at least two months.

(2) When employment does not exceed the limits of this division, there shall be no suspension or forfeiture of the allowance.

(3) Membership in the retirement system shall not be allowed a retirant employed under this division.

(C) A retirant may be regularly employed in full-time employment covered by this system provided he has received his retirement allowance for at least eighteen months. When a retirant is so employed:

(1) The employer shall notify the retirement board of such employment before the end of the month then current and any overpayment of allowance resulting from lack of notice shall be charged to the employer;

(2) The pension portion of the retirement allowance shall cease on the first day of the month following the date of such employment and shall thereafter be forfeited until the first day of the month following the termination of such employment;

(3) The annuity portion of the retirement allowance shall be suspended on the first day of the month following such employment, and thereafter shall accumulate to the credit of the retirant to be paid in one sum after his employment is terminated;

(4) Such an employee shall become a new member with all privileges and obligations of such membership, except that such new membership beginning on or after July 1, 1955, shall not include the survivor benefit rights provided by section 145.45 of the Revised Code.

(5) Upon service termination, a retirant may receive a refund of retirement deductions taken from his earnable salary during his re-employment, or he may receive a supplemental retirement allowance, based on contributions and service credit accrued subsequent to his termination of benefits.

(D) A retirant shall not receive a retirement allowance for any period for which he is compensated under a contract or other arrangement whereby he is to perform personal or professional services for the employer by which he was employed at the time of retirement, except that in a time of critical need the director of the department of administrative services may exempt from the provisions of this section medical doctors who are licensed to practice in this state, who have been employed by the department of mental health or the department of mental retardation and developmental disabilities, and who have retired from the department, to continue to provide, under contract, professional services in department institutions. Notice of each such exemption shall be filed with the secretary of state and the

public employees retirement system by the director of administrative services. Each exemption shall continue for a period of one year and may be renewed under the procedures for the original exemption.

(E) The public employees retirement board may make rules to carry the provisions of this section into effect and to prevent abuse of the rights granted.

Ohio Rev. Code § 145.39

A disability retirant shall retain his membership status. Also, he shall be considered on leave of absence from his position of employment during his first five years on the retired list, notwithstanding any contrary provisions in this chapter. The public employees retirement board may require any disability retirant to undergo a medical examination. If any disability retirant refuses to submit to a medical examination, his retirement allowance shall be discontinued until his withdrawal of the refusal. Should the refusal continue for one year, all his rights in and to such retirement allowance shall be forfeited. Upon completion of the examination by an examining physician or physicians selected by the board, the physician or physicians shall report and certify to the board whether the retirant is physically and mentally capable of resuming service similar to that from which he was retired. If the board concurs in the report that the disability retirant is capable of resuming service similar to that from which he was retired, the payment of the disability allowance shall be terminated not later than three months after such

determination or upon employment as a public employee. If the leave of absence has not expired, the retirement board shall certify to his last employer before retirement that the retirant is capable of resuming service and the employer shall restore the retirant to his previous position and salary or to a position and salary similar thereto.

The board may adopt rules requiring each disability retirant to file with the board an annual statement of earnings and current medical information on his condition.

If a disability retirant is restored to service by an employer covered by this chapter, his retirement allowance shall cease and the annuity and pension reserves on his allowance at that time in the annuity and pension reserve fund shall be transferred from the annuity and pension reserve fund to the employees' savings fund and the employers' accumulation fund, respectively.

The board may terminate disability retirement at the request of the retirant.

If a disability allowance is terminated for any reason, and the total disability allowance paid is less than the amount of the accumulated contributions of the member transferred to the annuity and pension reserve fund at the time of his disability retirement, the difference shall be transferred from the annuity and pension reserve fund to such other fund as may be required. In determining the amount of a member's account following the termination of disability retirement for any reason, the total allowance paid shall be charged against the member's refundable account.

If a former disability retirant again becomes a contributor to this system, the state teachers retirement system, or the public school employees retirement system, and complete[s] an additional two years of service credit, he shall be entitled to full service credit for the period of disability retirement.

If any employer employs any member who is receiving a disability allowance, the employer shall file notice of employment with the retirement board, designating the date of employment. In case the notice is not filed, the total amount of allowance paid during the period of employment prior to notice shall be charged to the employer and paid from funds supplied by the employer.

Ohio Rev. Code § 145.47

Each public employee who is a member of the public employees retirement system and who is a township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent shall contribute nine and one-half per cent of his earnable salary to the employees' savings fund, and every other public employee who is a member shall contribute eight per cent of his earnable salary to the employees' savings fund except that the public employees retirement board may raise the contribution rate to a rate not greater than ten per cent of the employees' earnable salary. The head of each state department, institution, board, and commission, and the fiscal officer of each local authority subject to Chapter

145. of the Revised Code, shall deduct from the earnable salary of each member on every payroll of such member for each payroll period subsequent to the date such employee became a member, an amount equal to the applicable per cent of such member's earnable salary. The head of each state department and the fiscal officer of each local authority subject to Chapter 145. of the Revised Code, shall transmit promptly to the secretary of the public employees retirement board a report of member deductions at such intervals and in such form as the board shall require, showing thereon all deductions for the public employees retirement system made from the earnable salary of each member employed together with warrants or checks covering the total of such deductions. A penalty of five per cent of the total amount due for the particular reporting period shall be added when such report together with warrants or checks to cover the total amount due from the earnable salary of all amenable employees of such employer are filed thirty or more days after the last day of such reporting period. Such penalty shall be added to and collected on the next succeeding regular employer billing. Interest at the rate of six per cent shall be charged on the amount of the penalty in case such penalty is not paid within three months after it is added to the regular employer billing. The secretary of the board after making a record of all such receipts shall deposit them with the treasurer of state for use as provided by Chapter 145. of the Revised Code. In addition to the periodical reports of deduction required by this section, the fiscal officer of each local authority subject to Chapter 145. of the Revised Code, shall submit to the board at least once each year, a complete listing of all

noncontributing appointive employees. Where an employer fails or refuses to deduct contributions for any employee and to transmit such amounts to the retirement system, the retirement board may make a determination of the employees' liability for contributions and certify to the employer the amounts due for collection in the same manner as payments due the employers' accumulation fund, provided that any amounts so collected shall be a penalty against the employer and held in trust pending receipt of contributions from such employees for the period involved as provided by law and, thereafter, the amount in trust shall be transferred to the employers' accumulation fund as a credit of such employer. The fiscal officer shall require each new member to submit to the board a detailed report of all his previous service as a public employee along with such other facts as the board requires for the proper operation of the public employees retirement system. If an employee fails to file the membership record provided in section 145.16 of the Revised Code within thirty days after becoming a contributor, the secretary shall so advise the fiscal officer who shall thereafter withhold all salary payments to such employee until such record is filed with the public employees retirement system.

Any member who, because of his own illness, injury, or other reason which may be approved by his employer is prevented from making his contribution to the system for any payroll period, may pay such deductions as a back payment within one year.

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29 C.F.R. § 1625.10(a)(1) and (f)(1)(iii) (formerly codified at 29 C.F.R. § 860.120(a)(1) and (f)(1)(iii))

(a)(1) *General.* Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization "to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such * * * employee benefit plan shall require or permit the involuntary retirement of any individual specified by secton 12(a) of this Act because of the age of such individuals." The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. Since section 4(f)(2) is an

exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed. The following section explain three key elements of the exception: (i) What a "bona fide employee benefit plan" is; (ii) what it means to "observe the terms" of such a plan; and (iii) what kind of plan, or plan provision would be considered "a subterfuge to evade the purposes of [the] Act." There is also a discussion of the application of the general rules governing all plans with respect to specific kinds of employee benefit plans.

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29 C.F.R. 1625.10(f)(1)(iii) (formerly codified at 29 C.F.R. § 860.120(f)(1)(iii))

(iii) *Retirement plans* – (A) *Participation.* No employee hired prior to normal retirement age may be excluded from a defined contribution plan. With respect to defined benefit plans not subject to the Employee Retirement Income Security Act (ERISA), Pub. L. 93-406, 29 U.S.C. 1001, 1003 (a) and (b), an employee hired at an age more than 5 years prior to normal retirement age may not be excluded from such a plan unless the exclusion is justifiable on the basis of cost considerations as set forth elsewhere in this section. With respect to defined benefit plans subject to ERISA, such an exclusion would be unlawful in any case. An employee hired less than 5 years prior to normal retirement age may be excluded from a defined benefit plan, regardless of whether or not

the plan is covered by ERISA. Similarly, any employee hired after normal retirement age may be excluded from a defined benefit plan.